IN THE SUPREME COURT OF MISSOURI

No. SC94462

G. STEVEN COX,

Appellant,

vs.

KANSAS CITY CHIEFS FOOTBALL CLUB, INC.

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable James F. Kanatzar
Case No. 1116-CV14143

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. WD76616

BRIEF OF THE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS AS AMICI CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF CONSENT

Appellant G. Steven Cox ("Cox") and Respondent Kansas City Chiefs Football Club, Inc. ("Chiefs") have consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The issues presented by this case are of vital importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri, many of whom rely on the protections of the Missouri Human Rights Act. For over fifty years, MATA attorneys have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members and their current and future clients will be directly affected by the Court's decision in this case.

As a result of its substantial collective experience litigating cases against employer defendants, MATA supports plaintiff/appellant's position that relevant evidence of discrimination should be freely admitted to ensure the fair determination of employment discrimination claims *particularly when the intent of management is the central issue*. On behalf of the citizens of the State of Missouri, MATA urges this Court to reverse the judgment below and remand the case to the trial court for a new trial upon a full evidentiary record.

This brief *amicus curiae* is submitted in support of Appellant Cox, and addresses the issues presented for review from a different perspective than that presented in the parties' briefs. In particular, MATA wishes to supplement Appellant's arguments by emphasizing and underscoring the critical importance of enforcing the plain language of the Missouri Human Rights Act and that evidentiary terms and phrases that have their origin in federal discrimination law be thoroughly scrutinized for compatibility with Missouri's evidentiary rules, the plain language of the MHRA and this Court's MHRA jurisprudence. Otherwise, their unthinking adoption risks thwarting the remedial purpose of this important legislation, as occurred in this case. For these reasons, MATA and its members have a strong interest in explaining why this Court should reverse the judgment below and remand the case for a new and fair trial.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A DECLARATION BY THE GENERAL MANAGER OF THE CHIEFS THAT "I NEED TO MAKE MAJOR CHANGES IN THIS ORGANIZATION AS SO MANY EMPLOYEES OF [CARL PETERSON] ARE OVER 40 YEARS OLD," ON THE BASIS THAT THE GENERAL MANAGER WAS A NON-DECISIONMAKER AND THEREFORE THE DECLARATION WAS A "STRAY REMARK," BECAUSE SUCH EVIDENCE WAS AN ADMISSION THAT WAS BOTH LOGICALLY AND LEGALLY RELEVANT TO PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT CORROBORATED OTHER RELEVANT EVIDENCE, NAMELY THAT DEFENDANT'S CHAIRMAN AND CEO "WANTED [THE ORGANIZATION] TO GO IN A MORE YOUTHFUL DIRECTION"

Ivie v. Smith, 439 S.W.3d 189 (Mo. 2014)

Fisher v. Pharmacia & Upjohn, 225 F.3d 915 (8th Cir. 2000)

Daugherty v. Maryland Heights, 231 S.W.3d 814 (Mo. 2007)

Bynote v. Nat'l Super Markets, Inc., 891 S.W.2d 117 (Mo. 1995)

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF OTHER ACTS OF AGE DISCRIMINATION BECAUSE SUCH EVIDENCE WAS BOTH LOGICALLY AND LEGALLY RELEVANT TO PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT TENDS TO PROVE ANOTHER FACT IN ISSUE AND/OR CORROBORATES OTHER RELEVANT

EVIDENCE NAMELY THE EXISTENCE OF A PLAN ORIGINATING AT THE HIGHEST LEVEL OF THE ORGANIZATION TO TAKE THE ORGANIZATION IN A MORE YOUTHFUL DIRECTION

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854 (Mo.App.E.D. 2009)

Kline v. City of Kansas City, 334 S.W.3d 632 (Mo.App.W.D. 2011)

Daugherty v. Maryland Heights, 231 S.W.3d 814 (Mo. 2007)

ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A DECLARATION BY THE GENERAL MANAGER OF THE CHIEFS THAT "I NEED TO MAKE MAJOR CHANGES IN THIS ORGANIZATION AS SO MANY EMPLOYEES OF [CARL PETERSON] ARE OVER 40 YEARS OLD," ON THE BASIS THAT THE GENERAL MANAGER WAS A NON-DECISIONMAKER AND THEREFORE THE DECLARATION WAS A "STRAY REMARK," BECAUSE SUCH EVIDENCE WAS AN ADMISSION THAT WAS BOTH LOGICALLY AND LEGALLY RELEVANT TO PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT CORROBORATED OTHER RELEVANT EVIDENCE, NAMELY THAT DEFENDANT'S CHAIRMAN AND CEO "WANTED [THE ORGANIZATION] TO GO IN A MORE YOUTHFUL DIRECTION"

Standard of Review

Although evidentiary rulings are normally reviewed under an abuse of discretion standard, the review should be *de novo* when the ruling is based on an erroneous declaration or application of law. *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 311 (Mo. 2011). In *Kivland,* this Court held that because the admissibility of an expert's opinion is governed by R.S.Mo. § 490.065, such a ruling necessarily involves interpretation of a statute, which is an issue of law to be reviewed *de novo.*

Here, the trial court applied an erroneous legal standard, in effect ruling that a declaration by a high ranking executive is *per se* inadmissible because this executive was

purportedly a non-decisionmaker and the declaration is thus labeled a "stray remark." Accordingly, this Court should review the ruling *de novo*. *Kivland*, supra; *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009).

Even if the applicable standard is for abuse of discretion, the trial court's ruling should be reversed because its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. 2013).

Argument

Plaintiff's theory of this case was that soon after Clark Hunt assumed control of the Kansas City Chiefs in 2006 after the death of his father – team founder, Lamar Hunt – the younger Hunt resolved to take the organization "in a more youthful direction" which resulted in the firing of plaintiff and seventeen other older workers – virtually all of whom were replaced by younger employees. Then General Manager Carl Peterson repeated this directive to witness Ann Roach in the Spring of 2008. (Tr. 1393:22-1396:7).[1]

Thereafter, these events unfolded:

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[1] Chairman Clark Hunt and General Manager Carl Peterson's declarations are admissions of a party-opponent within their respective scopes of authority as Chairman and General Manager. *Bynote v. Nat'l Super Markets, Inc.*, 891 S.W.2d 117, 124 (Mo. 1995). *See also*, *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850 (Mo.App.W.D. 2013).

- Hunt met with Assistant Manager Denny Thum in December 2008 and informed Thum that Hunt intended to "evaluate the organization." (Tr. 886:7-14; 892:11-893:6);
- Soon after Hunt's meeting with Thum, Carl Peterson was asked to leave and Thum was made "Interim President." (Tr. 892:6-893:2; 1152:24-1153:7; 3321:7-17);
- Clark Hunt hired Scott Pioli (age 43) in January 2009 as the new General Manager. (Tr. 1152:24-1153:6; LF 586);
- Five months later, Hunt hired Mark Donovan (age 43) *to replace Bill Newman (age 59)* as the Chiefs Chief Operating Officer (COO). (Tr. 2432:12-23; 1692:10-25, 3306:10-13; LF 586);
- Beginning in May 2009, Clark Hunt convened monthly management meetings that included Pioli, Donovan and Thum[2], where reorganization and restructuring of the organization was discussed. (Tr. 899:19-903:17; 3328:13-3330:5);
- Donovan and Pioli together were "working at the same time towards a common goal" which included the replacement of employees throughout both sides of the organization. (Tr. 910:3-10).

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[2] In September 2010, Thum, then age 59, was asked without explanation to leave the organization immediately, despite not yet having reached the halfway point of his three year contract. (Tr. 1040:5-24). In January 2011, Hunt named Donovan President. (Tr. 3305-3306).

In addition, plaintiff presented evidence, most of which was excluded from consideration by the jury, that between 2009 and 2011, numerous employees over the age of 40 were dismissed or forced to retire, virtually all of them replaced by younger employees. In other words, plaintiff's evidence suggested that the Chairman of the organization directed a coordinated effort to make the workforce younger – not by natural attrition but by firing or forcing the older workers out.

Against the backdrop of this critical evidence of intent which was either admitted or taken as offers of proof and then rejected, the trial court excluded the testimony of long time Chief's employee Herman Suhr who overheard General Manager Pioli in the fall of 2009 say:

> **I need to make major changes in this organization as so many employees of [former President and General Manager Carl Peterson] are over 40 years old.**

(LF 1011-1109).

The trial court's initial ruling was made *in limine* in a February 8, 2013 order that did not explain the basis for the ruling. (LF 1587-1588). During trial, on February 11, 2013, the court explained that the court's February 8 Order excluding Pioli's declaration was based on the trial court's view that Pioli "was not a decisionmaker in the termination of Mr. Cox" and because the statement "would fall into a category of a stray remark." (Tr. 280:3-284:10).

Pioli's statement was logically relevant because it corroborated the testimony about Clark Hunt taking the organization "in a more youthful direction." (Tr. 1393:22-1396:7).

Ivie v. Smith, 439 S.W.3d 189, 199 (Mo. 2014)("Evidence has probative force if it has any tendency to make a material fact more or less likely."); *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. 1991)("The test for relevancy is whether an offered fact tends to prove or disprove a fact in issue or corroborates other relevant evidence[.]"). Logical relevance has a very low threshold. *State v. Anderson*, 76 S.W.3d 275, 277 (Mo. 2002).

Indeed, the two discriminatory declarations about the age of employees, when considered in light of the then ongoing monthly management meetings regarding reorganization, together with the sheer number of older workers dismissed or forced to resign, made more likely what plaintiff alleged was the ultimate fact – that age was a contributing factor in plaintiff's discharge.

The trial court's reason for excluding Pioli's statement – that Pioli purportedly was a non-decisionmaker in connection with plaintiff's discharge – was against the logic of the circumstances. If Chairman Clark Hunt had resolved to take the organization in a more youthful direction, and if he had conveyed that directive to his management team including both Pioli and Donovan (as Pioli's declaration suggests, and as was further buttressed by each of them carrying out the firing of older workers in their separate spheres), the fact that Donovan and not Pioli carried out the directive in plaintiff's case does not make Pioli's statement any less probative.

The trial court's ruling was expressly based on a concept totally foreign to Missouri law – "stray remarks." Amicus MATA respectfully urges that this pejorative phrase should not be allowed to "stray" into Missouri jurisprudence. The term itself denigrates the validity of the proffered evidence. More importantly, the term is a vestige of the analysis

used under federal law to determine whether or not to apply the *McDonnell Douglas v. Green*[3] burden-shifting framework. This Court abandoned the *McDonnell Douglas v. Green* model of evaluating proof in *Daugherty v. Maryland Heights,* 231 S.W.3d 814, 819 (Mo. 2007), in favor of applying "the plain language of the MHRA and the standards set forth in MAI 31.24." Permitting the term "stray remarks" into the lexicon of Missouri MHRA jurisprudence brings no benefit, but rather carries with it the danger of confusing other trial judges into excluding highly probative *circumstantial evidence* of discrimination.

As this Court noted in *Daugherty,* there are two separate avenues of making a submissible discrimination case in the federal system – "either by presenting direct evidence of discrimination or, if no direct evidence is available, by using the burden-shifting model established in *McDonnell Douglas.*" *Id.,* n.6. Direct evidence of discrimination includes evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. *Id.* n.4. Such evidence is not common in discrimination cases because employers are shrewd enough to not leave a trail of direct evidence. *Id.*

Under the *federal analysis*, a statement reflecting discriminatory animus made by a non-decisionmaker does not constitute direct evidence of discrimination and the term "direct evidence" is defined negatively to exclude such "stray remarks." *Beshears v. Asbill,* 930 F.2d 1348, 1354 (8th Cir. 1991). Although "stray remarks" will not suffice under the

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

federal analysis to avoid application of the *McDonnell Douglas* formula, they have consistently been held to constitute probative evidence of discrimination. *See e.g., Fisher v. Pharmacia & Upjohn,* 225 F.3d 915, 923 (8th Cir. 2000)("Stray remarks therefore constitute circumstantial evidence that, when considered together with other evidence, may give rise to a reasonable inference of age discrimination."); *Girten v. McRentals, Inc.,* 337 F.3d 979, 983 (8th Cir. 2003)("such remarks are not irrelevant"); *Fast v. Southern Union Co., Inc.,* 149 F.3d 885, 891 (8th Cir. 1998)("stray remarks . . . raise genuine issues of material fact as to whether Nelson terminated Fast because of his age."); *Rivers-Frison v. Southeast Missouri Community Treatment Center,* 133 F.3d 616, 621 (8th Cir. 1998)("While these stray remarks fall short of being direct evidence of discrimination, they tend to prove that any pretextual reasons for discharge were proffered to hide intentional race discrimination."); *Bevan v. Honeywell, Inc.,* 118 F.3d 603, 610 (8th Cir. 1997)("Pederson's statement that it was difficult to place 'the old farts' in the new organization and Ruppel's human resources memo, which directly stated a company preference for younger talented individuals, constituted proper circumstantial evidence for the jury to consider in combination with all the other evidence."); *Fitzgerald v. Action, Inc.,* 521 F.3d 867, 877 (8th Cir. 2008)("stray remarks 'constitute circumstantial evidence that . . . may give rise to a reasonable inference of age discrimination.'"); *Ryther v. KARE 11*, 108 F.3d 832, 842 (8th Cir. 1997)("Not only is KARE 11's reduction of this evidence to a few 'stray remarks' factually incorrect, but, more importantly, such evidence *can,* if sufficient together with other evidence of pretext, support a reasonable inference of age discrimination.").

As these cases make clear, the trial court's application of the label "stray remark" to the proffered Pioli declaration was equivalent to finding that the declaration did not constitute direct evidence of discrimination. However, as this Court observed in *Daugherty*, direct evidence of discrimination "is not common in discrimination cases because employers are shrewd enough to not leave a trail of direct evidence." *Daugherty v. Maryland Heights,* 231 S.W.3d 814, 818 n.4 (Mo. 2007). Precisely because direct evidence of discrimination is so rare, to permit the application of an evidentiary filter that excludes all but direct evidence seriously cripples enforcement of the MHRA (and is wholly inconsistent with Missouri law that recognizes the probative value of circumstantial evidence).

The trial court's comments suggest that the trial court also excluded the evidence on the basis that it was not legally relevant:

> Therefore, it was my position then and it's my position now that the disputed statement falls into the category of a stray remark and therefore is inadmissible, and also that its prejudicial effect, that being the statement, outweighs any probative value that the statement would have for the jury.
>
> * * *
>
> For example, the prejudicial effect of the jury attributing that stray remark to a decision maker in this case as to the plaintiff's termination outweighs any probative value the statement brings into the case.

Tr. 949.

The "prejudicial effect" feared by the trial court was against the logic of the circumstances, making his ruling an abuse of discretion. Evidence is not "unfairly prejudicial" because it hurts the complaining party's case – *State v. Davis,* 318 S.W.3d 618, 640 (Mo. 2010) – yet that is exactly the test the trial court used. The danger that the jury would attribute the remark to a decisionmaker is a proper factor that could make the evidence admissible. Plaintiff's evidence suggests that Chairman Hunt was directing a unified effort to take the organization in a more youthful direction and Pioli's statement tended to corroborate the fact that Pioli well understood this management directive. The jury was entitled to infer that the age bias expressed by Pioli was relevant to plaintiff's termination because that age bias originated with Chairman Hunt who supervised both Pioli and Donovan in this corporate-wide effort to take the organization in a more "youthful direction" which resulted in the firing of plaintiff and the firing or forced resignation of numerous other older workers – virtually all replaced by younger employees.

As the court stated in *Morse v. Southern Union Co.*, 174 F.3d 917, 922 (8th Cir. 1999):

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it cannot compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman. [Numerous citations omitted]

174 F.3d at 922. This statement by the organization's general manager was an admission and should have been freely admitted. *Bynote v. Nat'l Super Markets, Inc.,* 891 S.W.2d

117, 124 (Mo. 1995)("[A] person with executive capacity is generally an agent for the entity he or she serves and has broad authority to bind the principal by his or her statements" and "[a]n admission of an agent or employee … 'may be received in evidence against his principal, if relevant to the issues involved, or the agent, in making the admission was acting within the scope of his authority ...'"). *See also*, *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850 (Mo.App.W.D. 2013).

The trial court failed to consider *Bynote*. If the trial court had considered *Bynote*, the trial court should have found that Pioli's discriminatory admission was within the scope of Pioli's duties as general manager and therefore should have been admitted into evidence and was not hearsay. Moreover, Pioli's discriminatory admission corroborated the directive by Clark Hunt to his management team to go in a more "youthful direction" – which is exactly what happened when Hunt's management team terminated the employment of Cox and seventeen other older workers.

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF OTHER ACTS OF AGE DISCRIMINATION BECAUSE SUCH EVIDENCE WAS BOTH LOGICALLY AND LEGALLY RELEVANT TO PLAINTIFF'S AGE DISCRIMINATION CLAIM, IN THAT IT TENDS TO PROVE ANOTHER FACT IN ISSUE AND/OR CORROBORATES OTHER RELEVANT EVIDENCE NAMELY THE EXISTENCE OF A PLAN ORIGINATING AT THE HIGHEST LEVEL OF THE ORGANIZATION TO TAKE THE ORGANIZATION IN A MORE YOUTHFUL DIRECTION

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Here, the trial court applied an erroneous legal standard ruling, in effect, that in the absence of a pleaded "pattern or practice" claim of discrimination and/or in the absence of proof that the other individuals discriminated against were similarly situated to plaintiff the evidence was *per se* inadmissible. Accordingly, this Court should review the ruling *de novo.*

Even if the applicable standard is for abuse of discretion, the trial court's ruling should be reversed because its ruling is clearly against the logic of the circumstances then

before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *St. Louis Cnty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 123 (Mo. 2013).

Argument

The trial court excluded a broad swath of plaintiff's relevant evidence when it sustained Defendant's Motion in Limine to Exclude Evidence of "Non-Similarly Situated" Employees, which sought to exclude any evidence that defendant's management team (directly under Chairman Hunt and at Chairman's Hunt's direction) terminated numerous other employees over the age of 40 in the same general time frame that plaintiff's employment was terminated. On the morning of the first day of trial, without elaborating on his reasoning, the trial court sustained defendant's motion, forbidding all seventeen witnesses from testifying to the fact that they were terminated, that they had a pending lawsuit, or even to the fact that they were over forty years of age:

> My order granting that motion in limine pertains to you calling these 17 witnesses to testify that they were terminated, they have a case of discrimination pending against the Chiefs, and I suppose they're over forty. If you want to call these witnesses for some other purpose, that is outside of my ruling on this motion in limine.

(Tr. 276). That ruling was repeatedly argued and reaffirmed throughout the trial. (Tr. 278, 285-87, 1427, 1432-33, 1751-61, 1772, 2309). The trial court provided its reasoning for the broad exclusionary ruling on the fourth day of trial:

> I think the other thing to keep in mind is the reason why the Court is keeping these 17 witnesses out of the case as it pertains to those three subject areas, and that is the Court heard extensive argument on this and was convinced that they were not similarly situated to the plaintiff and also that the plaintiff didn't plead pattern and practice or hostile work environment, and for those reasons and the other reasons that I'm not going to go into that were argued by the defense counsel, I've made that ruling.

(Tr. 1432-33).

This Amicus is satisfied that Appellant, and Amicus National Employment Lawyers Association, have fully and adequately addressed how the trial court erred in excluding relevant evidence on the basis that Appellant did not assert a "pattern or practice claim" of discrimination. Therefore, this Amicus addresses only that aspect of the trial court's ruling that misapplies the concept of "similarly situated employee" which, like the term "stray remark," was created by federal jurisprudence following *McDonnell Douglas v. Green* for application to cases under federal law.

As noted under Point I above, this Court abandoned the *McDonnell Douglas v. Green* burden shifting method of evaluating proof in its opinion in *Daugherty v. Maryland Heights,* 231 S.W.3d 814, 819 (Mo. 2007). Under the *McDonnell Douglas v. Green* formula, once the plaintiff establishes a prima facie case of discrimination, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its conduct. *Midstate Oil Co. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 845

(Mo. 1984). Once the employer satisfies this burden, the burden shifts back to plaintiff to show that the employer's articulated reasons are pretextual. *Id.*

Federal courts generally recognize that '"instances of disparate treatment can support a claim of pretext,' but the plaintiff bears the burden of establishing that the employees are '*similarly situated* in all relevant respects."' *Young v. Am. Airlines, Inc.*, 182 S.W.3d 647, 654 (Mo.App.E.D. 2005) (internal citation omitted). Employees are "similarly situated" when they "are involved in or accused of the same or similar conduct and are disciplined in different ways." *Id.*

In other words, this unique path in the federal "similarly situated" analysis could be applicable, for example, where the age discrimination plaintiff offers as his singular proof of "discrimination" the existence of one or more younger employees who engaged in misconduct similar to that for which the plaintiff was disciplined or fired, but were treated better (more favorably) than the protected-group plaintiff. In evaluating such evidence, it is axiomatic that the more similar the situations of the two employees, the stronger the inference of discrimination. Conversely, the more dissimilar the two situations, the less probative value the evidence has. This particular "similarly situated" test acts as a filter to screen out evidence where non-discriminatory explanations for the *difference* in treatment make an inference of discrimination impermissible.

Here, the trial court misapplied that particular test to exclude evidence of other older employees who plaintiff asserted were also discriminated against like he was, not differently. To require the plaintiff to rule out "differences" that might provide a non-discriminatory explanation why another employee received more favorable treatment as a

precondition to proving the other employee received the exact same treatment, simply makes no sense under Cox's theory for admissibility. Indeed, applying that model of the federal "similarly situated" requirement as a prerequisite to the admission of evidence of discriminatory treatment of other protected class employees could have the perverse result of providing a roadmap to employers intent on discriminating. For example, an employer with ten older workers could fire all ten for pretextual reasons, and prevent the jury from hearing about it, simply by using a different pretext in each case and then arguing, as the Chiefs successfully did here, that the other employees were therefore not "similarly situated." In other words, under this failed logic, defendants like the Chiefs could hide their true intent from the jury by inventing different pretextual reasons to fire different employees.

In *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 864 (Mo.App.E.D. 2009), the court came to this very same conclusion. In *Williams,* the plaintiff alleged her discharge was in retaliation for having made a sexual harassment complaint. *Williams* presented evidence that another employee, Zeb Ray, was also terminated shortly after making a complaint of sexual harassment. TSAI objected to the admission of evidence of Ray's termination on grounds virtually identical to those raised by the Chiefs in its motion in limine. TSAI objected to the admission of the evidence of Ray's termination at trial, alleging Ray and Williams were not similarly situated because Ray was not a probationary flight attendant, the two employees had a different status with the company, and each was accused of different misconduct. *Id.* at 864. The court found TSAI's argument "neither

persuasive nor relevant." *Id.* at 873. After reciting the "similarly situated" standard, the *Williams* court noted:

> *Under this federal analysis*, Ray and Williams are not "similarly situated" because they were not involved in the same conduct yet disciplined in different ways. In fact, Williams premises the introduction of the evidence relating to Ray's termination on the assertion that Ray and Williams were involved in the same conduct and disciplined in the exact same way. As such, we do not see the relevance of TSAI's argument that Ray and Williams were not "similarly situated" as it relates to the admission of evidence regarding Ray's termination.

Id. (emphasis added).

Rather, the *Williams* court noted, Ray's situation was sufficiently similar to Williams' to be relevant: both were females who filed sexual harassment complaints against male pilots and both were terminated within sixty days of making their complaint. *Id.* at 874.

In this case, for very proper reasons, the other older employees were each sufficiently comparable to plaintiff's situation to be admissible: They were in the same protected age group; they were similarly fired for pretextual reasons after Clark Hunt decided to take the organization in a more youthful direction; all after monthly meetings among the same upper management group who carried out the plan by replacing the fired, protected-group employees with younger ones.

The *Williams* case was provided to the trial court and explained in detail in an extended argument on the fourth day of trial. (Tr. 1751-57). However, the trial court remained confused by the *Williams'* court's recitation of the several facts that made Ray's termination and Williams' termination sufficiently similar to be relevant. (Tr. 1771-72).

This Court should clear up this confusion by holding that the particularized federal "similarly situated" test used in work-rule violation cases does not apply to the admission of other acts of discrimination. Rather, the only test for the admissibility of such evidence should be the same Missouri rules of logical and legal relevancy applicable to any evidence – does the offered fact tend to prove or disprove a fact in issue or corroborate other relevant evidence? *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. 1991).

Such a rule has already been articulated by the Missouri Court of Appeals, Western District and it should be adopted by this Court. *See, Kline v. City of Kansas City*, 334 S.W.3d 632, 643 (Mo.App.W.D. 2011), holding that in discrimination cases, evidence is relevant if "evidence would allow 'a rational finder of fact to infer a discriminatory motive or ... [to] conclude that the employer intended to discriminate in reaching the decision at issue.'" (internal citation omitted) *See also, Smith v. Aquila, Inc.,* 229 S.W.3d 106, 124 (Mo.App.W.D. 2007) ("The questions facing factfinders in discrimination cases are both 'sensitive and difficult,' and there is seldom 'eyewitness testimony as to the employers' mental processes.'" *Id.* (internal citation omitted) Therefore, "[w]hen intent is the focus of the inquiry, 'evidence should be allowed to take a wide range,' and a party's actions toward others which tend to demonstrate intent in the present case [are] relevant." *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 591 (Mo.App.W.D. 2008) (internal citation

omitted)). The approaches taken in these cases are consistent with this Court's MHRA jurisprudence in the aftermath of *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 90 (Mo. 2003).

CONCLUSION

The right to a trial by jury is of little value if the jury's right to assess relevant evidence is usurped by the trial court's far-reaching exclusionary rulings. This is particularly true when such exclusionary rulings are made before trial, and are based on an erroneous adoption of federal law concepts related to the *McDonnell-Douglas v. Green* analytical framework that this Court has abandoned. Amicus MATA respectfully requests that the defendant's judgment be reversed, and this case remanded for new trial on all issues.

Respectfully Submitted,

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THE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS AS AMICI CURIAE IN SUPPORT OF APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 5,449 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 6, 2015, the foregoing document was served through the electronic filing system upon:

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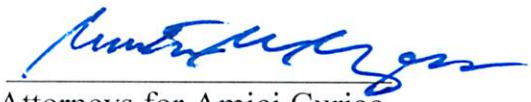

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